STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEVIN YOUNG,

Defendant-Appellant.

UNPUBLISHED
July 15, 2003

No. 239523
Wayne Circuit Court
LC No. 01-000241-01

Before: Hoekstra, P.J., and Fitzgerald and White, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of two counts of armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced as a second habitual offender, MCL 769.10, to concurrent terms of seven to fifteen years for the armed robbery convictions and a consecutive five-year term for the felony-firearm conviction. We affirm.

Defendant first argues that the trial court erred in allowing complainant Fong Yang to identify defendant in court when Yang was previously subjected to an improper photographic showup that tainted any subsequent identification. We disagree.

An identification procedure can be so suggestive and conducive to irreparable misidentification that it denies an accused due process of law. *People v Anderson*, 389 Mich 155, 169; 205 NW2d 461 (1973); *People v Williams*, 244 Mich App 533, 542; 624 NW2d 575 (2001). To establish that an identification procedure denied him due process, a defendant must show that the pretrial identification procedure was so suggestive under the totality of the circumstances that it led to a substantial likelihood of misidentification. *Williams, supra.* If a witness is exposed to an impermissibly suggestive pretrial lineup or showup, his in-court identification of the defendant will not be allowed unless the prosecutor shows by clear and convincing evidence that the in-court identification would be based on a sufficiently independent basis to purge the taint of the illegal identification. *People v Gray*, 457 Mich 107, 115; 577 NW2d 92 (1998); *People v Kachar*, 400 Mich 78, 96-97; 252 NW2d 807 (1977). In determining whether an in-court identification would be sufficiently independent, the court considers: (1) the witness's prior knowledge of the defendant; (2) the witness's opportunity to observe the criminal during the crime; (3) the length of time between the crime and the disputed identification; (4) the witness's level of certainty at the prior identification; (5) discrepancies between the pretrial identification description and the defendant's actual appearance; (6) any prior proper

identification of the defendant or failure to identify the defendant; (7) any prior identification of another as the culprit; (8) the mental state of the witness at the time of the crime; and (9) any special features of the defendant. *Gray, supra* at 116; *Kachar, supra* at 95-96.

"The independent basis inquiry is a factual one, and the validity of the victim's in-court identification must be viewed in light of the 'totality of the circumstances'." *Gray, supra* at 115, quoting *Neil v Biggers*, 409 US 188, 199; 93 S Ct 375; 34 L Ed 2d 401 (1972). The trial court's findings are reviewed for clear error. *Gray, supra* at 115. Clear error exists when the reviewing court is left with a definite and firm conviction that a mistake was made. *People v Kurylczyk*, 443 Mich 289, 298 (Griffin, J.), 318 (Boyle, J.); 505 NW2d 528 (1993).

Following a *Wade*[1] hearing, the trial court found that Yang was subjected to an unduly suggestive photographic showup, but that there was a sufficient independent basis upon which to make an in-court identification of defendant as the robber. In considering the *Kachar* factors, the trial court found that Yang had the opportunity to observe defendant during the robbery. This finding was supported by Yang's testimony at the *Wade* hearing that the area where the robbery occurred was well lit, that the robber stood less than a foot away from him, and that, notwithstanding the mask worn by the robber, Yang could see his eyes and nose. The trial court next found that the time between the robbery and the identification of defendant as the robber was short enough to favor a finding that there was an independent basis for identification. The evidence showed that the robbery occurred on December 7, 2000, and Yang identified defendant at the photographic showup on December 8, 2000, and at the preliminary examination on December 21, 2000. The trial court also found that Yang's description of the robber generally matched defendant's description in terms of height, weight, and clothing. This finding is supported by the fact that Yang described the robber as African-American, 5'8" to 5'11" tall, weighing between 170 and 180 pounds, and wearing a black work jacket, and black clothes, while defendant is described as African-American, 5'9" tall, weighing 185 pounds, and wearing a black jacket, a black hooded sweatshirt, black pants and black shoes when he was arrested on December 7, 2000. The trial court next found that Yang, while tired, was not suffering from fatigue or under the influence of alcohol or drugs such as would prevent him from making accurate observations of the robber. Yang's testimony was that he was tired from working a full shift but that he was not overly fatigued or under the influence of drugs or alcohol at the time of the robbery.

The remaining factors do not undermine the court's decision. While Yang had no prior knowledge of defendant, that is only one factor. Although Yang first stated that he would not be able to identify the robber, he made that statement before being shown the photographs, and before observing defendant. Further, Yang never identified someone else as the robber.

Thus, the trial court's findings on the *Kachar* factors were supported by the evidence adduced at the *Wade* Hearing. Given that most of the *Kachar* factors favored finding an independent basis for an in-court identification of defendant, this Court cannot say the trial court erred in ruling that such a basis existed and in allowing the in-court identification.

[1] *United States v Wade*, 388 US 218; 87 S Ct 1926; 18 L Ed 2d 1149 (1967).

Defendant also argues that the trial court erred in denying his motion to dismiss brought for the reason that the police failed to preserve defendant's car as evidence for the trial. We disagree.

It is preferable that the police keep all evidence until a criminal prosecution is concluded. *People v Tate*, 134 Mich App 682, 692; 352 NW2d 297 (1984). Failure to preserve evidence that may have exonerated the defendant will not constitute a denial of due process unless bad faith is shown on the part of the police. *People v Hunter*, 201 Mich App 671, 677; 506 NW2d 611 (1993), citing *Arizona v Youngblood*, 488 US 51, 57; 109 S Ct 333; 102 L Ed 2d 281 (1988). Whether failure to preserve evidence constitutes a denial of due process is an issue of law requiring de novo review. *Hunter*, *supra* at 677.

While the Detroit police department sold defendant's car from the impound lot before the case came to trial, there is no evidence that the police acted in bad faith. The officer in charge of the case testified that he was unaware of the sale, which was accomplished without his knowledge or consent. Also, the car was sold before any defense request for the vehicle was made. Further, defendant was given the name and address of the purchaser, thus defendant could have located and examined the car. Additionally, there was ample testimony at trial regarding police inability to open the trunk in the manner described by the prosecution witness who testified that he saw defendant place a gun in the trunk of the car. Hence, defendant was not denied due process by the prosecution's failure to retain control of defendant's car for use at trial.

Finally, defendant argues that the trial court erred when it refused to instruct the jury that had his car been produced, it would have been favorable to him. Again, we disagree.

Claims of instructional error are reviewed de novo on appeal. *People v Hall*, 249 Mich App 262, 269; 643 NW2d 253 (2002). An instruction that had evidence been introduced it would have been favorable to the defendant is not appropriate where the evidence was known or at least within the sphere of knowledge of defendant, no effort was made to ensure its production at trial, and the evidence is not material to the issues at trial, in the sense that it creates a reasonable doubt. *Tate, supra* at 691-692. Other factors to be considered are whether the evidence was destroyed before any defense request and whether the destruction of the evidence was motivated by any bad faith or improper motive. *Id.*

Where defendant was in possession of information regarding the location of the car and made no effort to secure the car for production at trial, where the value of any evidence obtained from an examination of the car is speculative and relatively tangential, where the car was sold before any defense request was made, and where there was no evidence of bad faith on the part of the police, the trial court did not err in denying defendant's request for an instruction that had the car been produced it would have been favorable to defendant.

Affirmed.

/s/ Joel P. Hoekstra
/s/ E. Thomas Fitzgerald
/s/ Helene N. White